ALEXANDER L. STEVAS
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No. 80-1833

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CHARLES E. FAIRCLOTH,

Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District, Fourth Division

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

The respondent, Norfolk and Western Railway Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Illinois Appellate Court, First District, Fourth Division. That opinion is reported at 89 Ill. App. 3d 923, 412 N.E.2d 634 (1980).*

* Petitioner incorrectly asserts that the case was heard by the First District, First Division. Petitioner erroneously indicates the case citation as 414 N.E.2d 634 (1980).

STATEMENT OF THE CASE

The petitioner seeks a writ of certiorari to review the decision of the Illinois Appellate Court. The opinion affirmed the judgment of the trial court. The trial court entered judgment on a jury verdict which was adverse to the petitioner. The petitioner in his Statement of Facts has distorted the facts and history of this case. In addition the Statement of Facts is in part argumentative. Petitioner's case was not uncontradicted and unimpeached in the trial court. Instead of undertaking to correct the petitioner's distortions respondent directs this Court's attention to the opinion of the Illinois Appellate Court (Appendix A to the Petition for Certiorari, pp. A2-A6, A7-A8), in which the facts are impartially and accurately set forth and analyzed.

Petitioner's statement that the Appellate Court's opinion is confusing is not borne out by a reading of the opinion.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Judgment Of The Trial Court Or The Opinion Of The Appellate Court And The "Safe Place To Work Decisions."

Petitioner argues that some aspect of this case is in conflict with the requirement that the railroad provide a reasonably safe place to work; a requirement noted by this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350 (1943). Petitioner, however, does not specify the nature of the conflict. Petitioner is either arguing that the jury's verdict, which the trial court refused to set aside, conflicts with *Bailey* v. *Central Vermont Ry., supra,* or that the opinion of the appellate court conflicts with that case; it is not clear which. But, either hypothesis is unconvincing.

If petitioner's argument is that the jury verdict is wrong then he presents a pure question of fact to this Court. All questions of the respondent's alleged negligence, including whether the railroad provided a safe work place, went to the jury in this case—just as this Court in *Bailey* held that they should.

The trial court expressly instructed the jury that:

> It was the duty of the Norfolk and Western Railway Company, to use ordinary care to provide plaintiff with a reasonably safe place in which to do his work at the time of each occurrence. (Plaintiff's instruction 11)

The court also instructed the jury that one of plaintiff's claims as to defendant's negligence was failure to use ordinary care to provide plaintiff with a reasonably safe place in which to work (Plaintiff's instruction 16). Thus, at trial, it was the jury that resolved that factual issue adversely to petitioner. This Court has declined to grant certiorari to reexamine or to determine controverted questions of fact in cases having no other issue. *Houston Oil Company of Texas et al* v. *Goodrich Service Co.*, 245 U.S. 440, 441 (1918); *Southern Power Co.* v. *Public Service Co.*, 263 U.S. 508, 509 (1924).

If, on the other hand, petitioner asserts that the "conflict" is with the opinion of the Illinois Appellate Court it must be noted that this case has never presented an issue as to whether the railroad had the duty as set forth in *Bailey*, *supra*, and nothing in the opinion of the appellate court deviates from the "safe place to work decisions." It must also be noted that petitioner did not argue, at any stage below, to the appellate court that the trial court had erred in any manner in failing to follow the "safe place to work decisions." The Appendix hereto shows the issues raised below by petitioner and reveals that no argument relating to the "safe place to work decisions" has been made before in this case. Thus, petitioner has waived this issue, if indeed it exists.

The real basis of petitioner's argument, which is made in the guise of a "conflict of decisions" argument for purposes of the petition for certiorari, is stated in the petition for certiorari on page 14:

> Contrary to the Opinion, the evidence was overwhelmingly contrary to the verdicts.

This, in fact, is petitioner's "conflict" argument. It does not raise a question of conflict between decisions or even a question of

law. Petitioner asks nothing more of this Court than that it weigh the evidence, a task already performed in the instant case by the jury, the trial judge and the appellate court; each arriving at the same conclusion.

B. The Appellate Court Issued An Opinion Deciding All The Questions Raised On Appeal.

Petitioner's due process argument seems to be a complaint about how the Illinois Appellate Court responded to the issues he raised before it; he argues that the issues which he presented to the Illinois Appellate Court were somehow ignored. Even if petitioner were correct in his protestations that an issue was left unaddressed in the opinion below, he would not have been deprived of due process. The fact that an appellate court decides a case adversely to an appellant is not in itself a violation of the due process clause. Petitioner's due process theory would raise to a constitutional level the dissatisfaction with an appellate ruling which almost every losing litigant experiences.

In any event, petitioner has advanced no discernable due process claim. Tribe, American Constitutional Law, p. 543, §10-14 (1978), notes:

> The Court has long maintained its adherence to a flexible approach in deciding what process is due. . . . There has nevertheless been considerable regularity in the procedural safeguards prescribed, since the determination of what process is due has centered on an adversary model whose core constant has involved granting notice and an opportunity to be heard to those individuals or groups whose personal interests are adversely affected by government action. (Footnotes omitted.)

Here the petitioner, represented by experienced counsel, had an error free trial by jury, an extensive hearing on a post trial motion, an appeal, a petition for rehearing to the appellate court and a petition for leave to appeal to the Illinois Supreme Court.

The fairness of petitioner's trial is corroborated by the fact that the petitioner does not suggest that the trial court erred in any ruling as to testimony, deprived him of any jury instruction he sought on the issues now presented, or precluded him from making any motion or argument he desired to make. Contrary to the puzzling argument of petitioner the Illinois Appellate Court fully resolved this case.

C. The Federal Questions Now Asserted By The Petitioner Were Not Presented To The Court Below And Are Therefore Not Preserved On Appeal.

The petitioner has not complied with Rule 21.1(h) of this Court with regard to specifying how the federal questions sought to be reviewed were raised, the method of raising them, the way they were passed on, and pertinent quotations of specific portions of the record with specific references to places in the record where the matter appears.

In point of fact the petitioner did *not* suggest in his Petition for Rehearing to the Illinois Appellate Court or in his Petition for Leave to Appeal to the Illinois Supreme Court that there was a conflict between any aspect of the instant case and this Court's "safe place to work decisions." Petitioner's nebulous assertion that the due process clause is involved in this case has not been made before. The Appendix hereto shows the issues raised below by petitioner at each stage of the proceedings. Those issues make it clear that the questions presented to this Court were not presented by petitioner below.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ISSUES PRESENTED ON APPEAL BY PETITIONER TO THE ILLINOIS COURTS

A. The issues presented for review by petitioner to the Illinois Appellate Court were as follows (Appellant's Brief, p.2):

ISSUES PRESENTED FOR REVIEW

1. Were the verdicts contrary to the manifest weight of the evidence?

2. Did the denial of the Post Trial Motion constitute an abuse of discretion where the trial court ruled ". . . . that the record itself speaks and the only one who can decide this matter is the appellate court" (T. 572)?

3. Did the trial court refuse to exercise its discretion on the questions of law and on the questions of the weight of the evidence presented to it when it wholly failed to address such matters?

B. The three questions presented to the Illinois Appellate Court on petition for rehearing where (Appellant's Petition For Rehearing, pp. 2, 9, 11):

I. The court overlooked plaintiff's first point on appeal. Instead, it decided a point never raised by the plaintiff.

II. The trial court abused its discretion by holding that the verdicts were not contrary to the preponderance of the evidence.

III. This court decides a contention that plaintiff never made by finding that the trial court exercised its discretion and based its finding in part on a non-existent concession.

C. The points made to the Illinois Supreme Court were as follows (Petition For Leave To Appeal, p. 2):

> Points relied on to reverse the judgment of the Appellate Court.
>
> 1. The Appellate Court affirmed the judgment, but did not consider whether justice was done below. It thus avoided fundamental questions raised as to sufficiency of the evidence to support the verdicts.
>
> 2. The Appellate Court abdicated its jurisdiction by not deciding the plaintiff's first point on appeal: that the verdicts were contrary to the manifest weight of the evidence in a case where there was no defense evidence. Instead, the Appellate Court decided a point never raised: that the trial court had not abused its discretion in making a non-existent determination that the verdicts were not contrary to the manifest weight of the evidence. The opinion is the only one linking an abuse of discretion with a manifest weight of the evidence point.
>
> 3. The Appellate Court did not discuss the only abuse of discretion question presented which was that the trial court had abused its discretion in deciding that the verdicts were not contrary to the preponderance of the evidence in a case in which the defendant presented no evidence.